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No. 94-226

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In The

Supreme Court of the United States

October Term, 1994

THE FLORIDA BAR,

Petitioner,

vs.

G. STEWART McHENRY; WENT FOR IT, INC.; and JOHN T. BLAKELY,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF HYATT LEGAL SERVICES AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
Table of Citations	ii
Identity and Interest of Amicus Curiae	1
Summary of Argument	2
Argument	3
I. *Bates* has benefitted the administration of justice in America.	4
A. *Bates* has increased access to the American judicial system through the effects of attorney advertising.	4
B. Permitting truthful attorney advertising has led to lower costs for legal services, which also increases access to the American justice system.	6
C. To the extent that *Bates* has served to increase real and perceived access to the American justice system, public perception of the legal profession has improved.	7
D. Experience has not shown that permitting attorney price advertising with respect to routine legal services undermines professional standards.	9
II. Attorney price advertising of routine legal services is not inherently misleading.	11
Conclusion	13

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Bates v. State Bar, 433 U.S. 350 (1977) ..... *passim*

Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) 5

Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91 (1990) 5, 7

Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988) 9, 10, 11

United States Constitution Cited:

First Amendment 1, 3

Other Authorities Cited:

Federal Trade Commission, *Staff Report on Improving Consumer Access to Legal Services: The Case for Removing Restrictions or Truthful Advertising* 126-27 (1984) 7

Gay Jervey, *Joel Hyatt*, The American Lawyer, March 1989 ..... 5, 8

Geoffrey C. Hazard *et al. Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. Rev. 1084 (1983) 7

Contents

Page

APPENDIX

Appendix A — Letters of Consent 1a

IDENTITY AND INTEREST OF AMICUS CURIAE

Hyatt Legal Services respectfully submits this brief as amicus curiae in support of Respondents. Letters of consent of the parties to file this brief are copied and appear in the Appendix, *infra*.

Hyatt Legal Services was established in 1977, in direct response to *Bates v. State Bar*, 433 U.S. 350 (1977). In *Bates*, this Court held that truthful attorney advertising concerning the availability and price of routine legal services is commercial speech protected against an outright state prohibition by the First Amendment. From its founding, Hyatt Legal Services has provided routine legal services throughout the United States, and has engaged heavily in truthful advertising concerning such services.

Petitioner contends that *Bates* precipitated an erosion of public confidence in the legal profession and has, in turn, negatively affected the administration of justice. Petitioner and other amici curiae call upon this Court to "revisit" *Bates* and "return to the States the latitude to weigh the value to the public of attorney commercial solicitation against the adverse effects of such solicitation." Brief of Petitioner at 24; *see also* Amici Curiae Brief of Alabama State Bar Ass'n *et al.*, at 4; Amici Curiae Brief of the Dade County Trial Lawyers Ass'n & the American Bd. of Trial Advocates at 17 [hereinafter Brief of Dade County Trial Lawyers]; Amicus Curiae Brief of the Academy of Florida Trial Lawyers at 2. Responding affirmatively to their call would presumably permit states to prohibit completely, attorney advertising, as Arizona did before *Bates*.

Perhaps like no other organization or firm in this country, Hyatt Legal Services is able to speak to the positive effects of *Bates* on the American legal system, and thus counter with data and evidence the asserted but largely unsupported claims of

Petitioner and other amici curiae. Hyatt Legal Services believes the settled *Bates* precedent should be reaffirmed, not "revisited," by this Court.

SUMMARY OF ARGUMENT

In important ways, the *Bates* decision has positively affected the public perception of the legal profession and the administration of justice.

The promise of justice without access to it has long been a frustration of many Americans. Prior to *Bates*, the middle class was not poor enough to qualify for free legal aid but felt not rich enough to obtain high-cost legal services, and was often shut out of the American justice system. What *Bates* did was permit attorneys to reach out to this large sector of the American populace which often has very basic legal needs. The experience of Hyatt Legal Services is that truthful advertising of routine legal services has greatly expanded access to the American justice system.

Increased access to the justice system has, in turn, improved public regard for it. No longer is the justice system the sole province of the wealthy. It is now accessible and affordable to average Americans, too. The files of Hyatt Legal Services overflow with stories of individuals who were satisfied with the legal profession for the first time by being exposed to convenient, low-cost, routine legal services. Without *Bates*, the economies of scale to bring down the cost of such services, and the ability to inform the public that such services are available, would not have been possible.

The experience of Hyatt Legal Services also calls into question other arguments for "revisiting" *Bates*. It is the experience and view of Hyatt Legal Services that routine legal

services do indeed exist, and can be performed for a set fee without sacrificing professional standards or quality.

ARGUMENT

In *Bates*, the Court generally held that attorney advertising is a form of commercial speech subject to First Amendment protection. Specifically, it held that states may not place an outright ban on attorney price advertising with respect to routine legal services.

In reaching this decision, the Court examined whether attorney advertising is inherently misleading, and found that it is not. *Bates*, 433 U.S. at 372-75. It also considered certain specific interests that states might have in banning attorney advertising — its alleged adverse effect on professionalism; its alleged adverse effect on the administration of justice; its alleged undesirable economic effects; its alleged adverse effect on the quality of service; and certain alleged enforcement difficulties — and found them insufficient to outweigh an attorney's First Amendment right to commercial speech. *Id.* at 368-72, 375-79.

Petitioner and amici contend that the Court in *Bates* did not properly evaluate the nature of attorney advertising or properly assess or anticipate the impact of attorney advertising on the legal profession and the administration of justice. Petitioner contends that, since *Bates*, "the great bulk of attorney advertising provides citizens with little or no useful information" and, worse, has "resulted in a negative perception of, and loss of confidence in the legal profession." Brief of Petitioner at 14. This, Petitioner and amici suggest, has negatively impacted the administration of justice in America. *See id.* at 20; *see also* Brief of Dade County Trial Lawyers at 7, 9-12; Amicus Curiae Brief of the Association of Trial Lawyers of America at 13. This distorted picture does not tell the real story.

I.

BATES HAS BENEFITTED THE ADMINISTRATION OF JUSTICE IN AMERICA.

In *Bates,* Justice Powell predicted that establishing First Amendment protection for attorney advertising would "effect profound changes in the practice of law." 433 U.S. at 389 (Powell, J., concurring in part and dissenting in part). He was right. On balance, these changes have improved our justice system.

A. *Bates* has increased access to the American judicial system through the effects of attorney advertising.

To receive the justice promised by the American judicial system, Americans with legal claims must first find access to it. The Court in *Bates* recognized the fact that attorney advertising would assist Americans in obtaining such access:

> As the bar acknowledges, "the middle 70% of our population is not being reached or served adequately by the legal profession." ABA, Revised Handbook on Prepaid Legal Services 2 (1972). . . . Among the reasons for this underutilization is fear of the cost, and an inability to locate a suitable lawyer. . . . Advertising can help to solve this acknowledged problem: Advertising is the traditional mechanism in a free-market economy for a supplier to inform a potential purchaser of the availability and terms of exchange. The disciplinary rule at issue likely has served to burden access to legal services, particularly for the not-quite-poor and the

> unknowledgeable. A rule allowing restrained advertising would be in accord with the bar's obligation to "facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available." ABA Code of Professional Responsibility EC 2-1 (1976).

Bates, 433 U.S. at 376-77; *see also Peel v. Attorney Registration & Disciplinary Comm'n,* 496 U.S. 91, 110 (1990) ("A principal reason why consumers do not consult lawyers is because they do not know how to find a lawyer able to assist them with their particular problems. Federal Trade Commission, Staff Report on Improving Consumer Access to Legal Services: The Case for Removing Restrictions of Truthful Advertising 1 (1984)."); *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447, 473 n.4 (1978) ("As we noted . . . in *Bates,* there appears to be substantial underutilization of lawyers' services. . . . This problem may be especially acute among the middle-class majority of this country, persons too affluent to qualify for government-funded legal services but not wealthy enough to afford the fees of the major law firms that serve mostly corporate clients.").

The experience of Hyatt Legal Services proves what was presumed in *Bates.* The federal constitutional floor established by *Bates* enabled Hyatt Legal Services to advertise up-front legal fees for routine services such as uncontested divorces and simple wills. In large part due to the success of its straightforward advertising, Hyatt Legal Services has been able to provide legal services to approximately 2 1/4 million Americans in the last 17 years. According to a 1989 survey, 45% of the then 1 1/2 million Hyatt Legal Services clients had never before visited a lawyer. *See* Gay Jervey, *Joel Hyatt,* The American Lawyer, March 1989, at 90. Thus, in the experience of just one firm, hundreds of thousands of Americans accessed our judicial system and

obtained legal services for the first time as a result of the *Bates* decision.

B. Permitting truthful attorney advertising has led to lower costs for legal services, which also increases access to the American justice system.

In 1984, staff members of the Federal Trade Commission concluded a detailed empirical investigation into the effects of attorney advertising. Surveying approximately 3200 attorneys in 17 states, the group determined that attorney advertising served to reduce prices for legal services:

> The study provides convincing support for the proposition that greater flexibility to engage in non-deceptive advertising will be associated with lower prices for consumers of legal services. . . . [T]here appears to be a continuous relationship between prices and regulations, with the lowest prices associated with the fewest restrictions on attorney marketing practices.
>
> . . . Furthermore, the study provides evidence for the proposition that as advertising increases in the legal services market, prices will decline. We also found support for the theory that advertising will exert a pro-competitive influence on the market. . . . The empirical data, therefore, support the information theory of advertising and establish strong evidence for relaxing unnecessary restrictions on truthful, non-deceptive advertising practices.

Federal Trade Commission, *Staff Report on Improving Consumer Access to Legal Services: The Case for Removing Restrictions of Truthful Advertising* 126-27 (1984).

The experience of Hyatt Legal Services provides some insight into how attorney advertising can effectively reduce prices for certain legal services aside from exerting a pro-competitive influence on the market. By being able to advertise nationwide, Hyatt Legal Services was able to achieve economies of scale for the provision of certain routine legal services that it simply could not have achieved otherwise. These economies of scale enabled Hyatt Legal Services to provide legal services with respect to uncontested divorces and simple wills, for example, at below-average prices. *Cf.* Jervey, *supra*, at 95. *See generally* Geoffrey C. Hazard *et al.*, *Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. Rev. 1084, 1107-09 (1983) (providing economic rationale for why prices for "standardizable" legal services should decrease with increase in attorney advertising).

Legal trade associations, representing the pecuniary interests of their members, opposed Hyatt Legal Services as it sought to introduce price competition through advertising. Those battles were won by Hyatt Legal Services, as *Bates* helped pave the way to introduce real price competition through attorney advertising.

C. To the extent that *Bates* has served to increase real and perceived access to the American justice system, public perception of the legal profession has improved.

As attorney advertising helped the "middle 70%" of our population gain access to legal services, the justice system became a system that works for all, and no longer a system that serves solely the socio-economic elite. Petitioner and amici argue

that the image and reputation of lawyers have suffered as a result of attorney advertising. But their argument misses the more important point that attorney advertising, by increasing access to the legal profession, increases public regard for it. The experience of Hyatt Legal Services provides ample evidence of this. Consider the following account, reported in *The American Lawyer,* March 1989, at 88, 90 (emphasis in original):

> A housewife in suburban Akron, Ohio — we'll call her Sheri Smith — was desperate. For three years her husband, Tom, a 48-year-old former construction worker suffering from congenital heart disease, had been unemployed while he waited for a heart transplant. Between caring for three children and an ailing husband, Sheri was unable to work. The Smiths could no longer turn a blind eye to their mounting bills. They could no longer stave off the inevitable: declaring bankruptcy.
>
> "I had absolutely *no* idea where to turn," Mrs. Smith recalls. "I was terrified of lawyers, those prices and all, maybe 'cause I'd been to an attorney once before and had gotten nowhere. I was totally dissatisfied with the whole ordeal. Every hour they spend, *whooey!* More money out of you. And then they don't tell you what's going on. They don't care."

Sheri Smith turned to Hyatt Legal Services because she saw a television advertisement. In the end, Smith says, "[t]hey didn't make us feel like scudbutters who had just run out on things. They not only helped us legally but made us feel better, too." *Id.* at 90.

There are countless examples of individuals who, like Sheri Smith, have gained satisfaction with the legal profession and the workings of the judicial system as a result of the demystification of legal services in the wake of *Bates.*

Some lament that people like Sheri Smith are causing the wheels of justice to grind to a halt under the heavy load of lawsuits. To the extent that justice under the law is delayed by increased utilization of legal services, the solution lies with streamlining judicial structures or increasing judicial personnel — it does not lie with restricting access. Such American promises as "equal protection" and "due process" are merely hollow words without access to the justice system. *Bates* has enabled Hyatt Legal Services and many other firms to provide such access for millions of Americans.

D. Experience has not shown that permitting attorney price advertising with respect to routine legal services undermines professional standards.

In her dissent in *Shapero v. Kentucky Bar Ass'n,* 486 U.S. 466 (1988), Justice O'Connor expresses the concern that attorney price advertising with respect to routine services might serve to undermine professional standards:

> [S]uch advertising practices will undermine professional standards if the attorney accepts the economic risks of offering fixed rates for solving apparently simple problems that will sometimes prove not to be so simple after all. For a lawyer to promise the world that such matters as uncontested divorces can be handled for a flat fee will inevitably create incentives to ignore (or avoid discovering) the complexities that

> would lead a conscientious attorney to treat some clients' cases as anything but routine.

Shapero, 486 U.S. at 485-86 (O'Connor, J., dissenting). Justice O'Connor apparently views this concern (in conjunction with a concern relating to the alleged inherently misleading nature of attorney price advertising for routine legal services — see II. below) as significant enough to justify a complete state ban on attorney price advertising of routine legal services. *Id.* at 485.

Hyatt Legal Services' extensive experience proves that this concern has not been borne out. One might expect that unacceptable legal work performed for a flat fee would be eventually detected by clients, and complaints filed. From 1990 to 1993, however, Hyatt Legal Services handled more than 530,000 cases, with fewer than .02% of these resulting in a malpractice complaint. Only a handful of these were found to be meritorious.

One of the chief reasons why professional standards are not undermined as Justice O'Connor fears is that prices for routine legal services can be set at the average cost of a particular casetype. In other words, the business decision to establish a set price takes into account that fact that some cases may require more work than others. The promise made to clients is not that their uncontested divorce, for example, can be handled for $X worth of work, but that their uncontested divorce will cost them $X. In this way, fear of the cost — one of the principal reasons middle-income people do not seek legal help — is eliminated.

II.

ATTORNEY PRICE ADVERTISING OF ROUTINE LEGAL SERVICES IS NOT INHERENTLY MISLEADING.

Chief Justice Burger, writing separately in *Bates*, claimed that "[b]ecause legal services can rarely, if ever, be 'standardized' and because potential clients rarely know in advance what services they do in fact need, price advertising can never give the public an accurate picture on which to base its selection of an attorney." 433 U.S. at 386 (Burger, C.J., concurring in part and dissenting in part); *see also id.* at 392-94 (Powell, J., concurring in part and dissenting in part); *Shapero*, 486 U.S. at 485 (O'Connor, J., dissenting).

The majority in *Bates* squarely confronted the issue of whether attorney price advertising of routine legal services is inherently misleading:

> Although the precise service demanded in each task may vary slightly, and although legal services are not fungible, these facts do not make advertising misleading so long as the attorney does the necessary work at the advertised price. The argument that legal services are so unique that fixed rates cannot meaningfully be established is refuted by the record in this case: The appellee State Bar itself sponsors a Legal Services Program in which the participating attorneys agree to perform services like those advertised by the appellants at the standardized rates. . . .
>
> . . . It is unlikely that many people go to an attorney merely to ascertain if they have a

> clean bill of legal health. Rather, attorneys are likely to be employed to perform specific tasks. Although the client may not know the detail involved in performing the task, he no doubt is able to identify the service he desires at the level of generality to which advertising lends itself.

Bates, 433 U.S. at 372-74.

Hyatt Legal Services' experience demonstrates that routine legal services do in fact exist, and that set fees can successfully be charged for such services. While life circumstances necessarily differ from client to client, material legal circumstances and the legal work necessary to address these circumstances often do not. Not all uncontested divorces, for example, are factually complicated. Even those that are factually complicated most often are not legally complicated. Though it often had to fight the legal establishment to do so, Hyatt Legal Services has offered set fees (again, based on pricing to the average case) for simple divorces, simple deeds, simple guardianships, simple adoptions, etc., for 17 years. Literally millions of clients have sought and obtained such services for the set fee.

CONCLUSION

Hyatt Legal Services, amicus curiae, respectfully urges this Court to uphold and reaffirm the basic federal constitutional protections afforded attorney advertising in *Bates* and its progeny.

Respectfully submitted,

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APPENDIX A — LETTERS OF CONSENT

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November 30, 1994

Joel Hyatt
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Re: The Florida Bar v. McHenry No. 94-226

Dear Mr. Hyatt:

This will confirm that respondents consent to your filing an *amicus curiae* brief in the above-named case in the Supreme Court of the United States.

Please note that by special order of the Court, all briefs must be *received* by the Clerk's office and by counsel for the parties by 3:00 p.m. on Tuesday, December 6, 1994. If necessary, we will accept service by FAX.

If I may be of any further assistance, please feel free to contact me.

Yours truly,
s/ Bruce Rogow
BRUCE ROGOW
Counsel of Record for Respondents

Appendix A

NO.94-226

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

THE FLORIDA BAR,

Petitioner,

vs.

G. STEWART MCHENRY, and WENT FOR IT, INC.,

Respondent.

CONSENT TO FILING AMICUS BRIEF

Petitioner, The Florida Bar, consents to the filing of an amicus brief by Hyatt Legal Services.

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Appendix A

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing consent has been served upon Bruce Rogow, Esquire, 2441 S.W. 28th Avenue, Ft. Lauderdale, Florida 33312 and Beverly A. Pohl, Esquire, 350 S.E. Second St., Ft. Lauderdale Florida 33301 on this 2nd day of December, 1994.

s/ Barry Richard
BARRY RICHARD